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No. 82-1150

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

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HOWARD ELLIS, *et al.*,
*Petitioners,*
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
*Respondents.*

---

ALLEN L. FAILS, *et al.*,
*Petitioners,*
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This brief, *amicus curiae*, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to the Rules of this Court.

### INTEREST OF *AMICUS CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast

majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward this end, they engage in collective bargaining pursuant to state public employee collective bargaining statutes or, in the absence of express statutory authorization, pursuant to judicially sanctioned *ad hoc* arrangements agreed to between a particular affiliate and school board.[1] Where permitted by state law, NEA affiliates seek to include in their collective bargaining agreements agency shop provisions (*i.e.*, provisions which require employees in the bargaining unit who choose not to join the exclusive representative to pay a fee to it). Because this Court is being asked to decide in the instant case under what circumstances a provision of this type is permissible under the United States Constitution, NEA has a substantial interest in the outcome.[2]

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[1] The employees of public school districts, colleges and universities are not covered by federal labor relations laws such as the Railway Labor Act or the National Labor Relations Act.

[2] The provision involved in the instant case establishes a "union shop," pursuant to which all employees in the bargaining unit are required to become members of the exclusive representative as a condition of continued employment. This precise type of arrangement is virtually non-existent in the public sector; the preferred alternative is the "agency shop," pursuant to which non-members must pay a fee to the exclusive representative without having to become members. From an analytical point of view, the difference is not significant because even in the private sector " '[m]embership' as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Thus, any constitutional principles the Court may enunciate will apply to both types of arrangement.

## SUMMARY OF ARGUMENT

1. The Court's decisions establish that the First Amendment permits an exclusive representative to expend compelled contributions, over objection, for activities that are "related to" collective bargaining, but that the expenditure of such fees at least for political and ideological activities that are not so related abridges the First Amendment rights of objecting employees. In defining the activities for which objecting employees may and may not be compelled to contribute, and in fashioning procedures to protect the rights of those employees, this Court has been sensitive to the "difficulties in judicially administered relief" and to the competing rights of the majority employees. The lower courts, however, have lost sight both of these concerns and the constitutional interests at stake. Agency shop litigation consequently has been unduly burdensome, and has resulted in the imposition of oppressive remedies that intrude unnecessarily on legitimate union activities and on the constitutional rights of the majority employees. (Part I, pp. 4-10, *infra.*)

2. This Court's decisions actually teach that under the First Amendment, objecting employees may not be compelled to contribute only to the cost of political and ideological activities of an exclusive representative that are unrelated to collective bargaining. Given this limited right, the appropriate judicial role simply should be to determine the extent to which an exclusive representative has incurred discrete expenditures for "unrelated" political and ideological activities, and the representative's only accounting obligation should be to separately identify such expenditures. (Part II(A), pp. 10-13, *infra.*)

Assuming, *arguendo*, that objecting employees have a constitutional right not to contribute to *any* activities of an exclusive representative that are "unrelated" to collective bargaining (regardless of whether these activities are political/ideological), the Court's decisions at least establish that activities are not "unrelated to" collective bargaining simply because they involve something other

than the negotiation or administration of a collective bargaining agreement. Employees constitutionally may be required to contribute to the cost of *any* activity undertaken by an exclusive representative in an effort to bring about improved working conditions. Although such improvements often are secured through collective bargaining and contract administration, an exclusive representative, particularly in the public sector, may engage in other activities in order to achieve them. The Constitution does not require that objecting employees be exempted from contributing to the cost of these latter activities. (Part II(B), pp. 14-21, *infra.*)

3. The constitutional rights of objecting employees—including the right not to have their fees "used, even temporarily, to finance [non-chargeable] activities," *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring), can be fully protected by a relatively simple, union-administered procedure pursuant to which an appropriate portion of the fees in question is placed in escrow. (Part III, pp. 22-30 *infra.*)

## ARGUMENT

### I. THE JUDICIAL INTEREST IN AVOIDING BURDENSOME LITIGATION AND OPPRESSIVE REMEDIES IN THE AGENCY SHOP AREA

This Court's decisions establish that both the Railway Labor Act ("RLA") and the First Amendment permit an exclusive representative to expend compelled contributions, over objection, for activities that are "related to" collective bargaining, but that the expenditure of such fees at least for political and ideological activities that are not so related violates the RLA and abridges the First Amendment rights of objecting feepayers.[3] In light

[3] *See Railway Employees Dept. v. Hanson*, 351 U.S. 225, 235 (1956); *International Assn. of Machinists v. Street*, 367 U.S. 740, 768 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209, 232-37 (1977). In *Hanson* and *Street*, the Court construed the RLA

of this distinction, there are two issues that must be resolved when an employee objects to an exclusive representative's expenditure of his or her fees. First, it must be determined to what extent, if any, the exclusive representative is making expenditures for "unrelated" political and ideological activities; second, a procedure must be fashioned that will protect the objecting employee's right to refrain from financing such activities and the exclusive representative's right to expend both the objecting employee's fees for activities that are related to collective bargaining and the money of non-objecting employees for *all* activities, including "unrelated" political and ideological activities.

In this context, the Court has been sensitive to the "difficulties in judicially administered relief," *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 122 (1963), that may result from the attempt to identify expenditures not chargeable to an objecting employee. Accordingly, the *standard* the Court has formulated for separating chargeable from non-chargeable expenditures is one that, on its face, is capable of easy application: unless an activity is undertaken "for political and ideological purposes unrelated to collective bargaining," *Abood*, *supra*, 431 U.S. at 232, it may be financed with compelled contributions. *See also* pp. 10-12, *infra*.

Similarly, the Court has cautioned against overbroad procedures that "encroach[] on the legitimate activities or necessary functions of the unions," *Street*, *supra*, 367 U.S. at 774, or that invade the majority's First Amendment "interest in stating its views without being silenced by the dissenters," *id.* at 773. Thus, the *remedies* the Court has approved to protect objectors' rights have been carefully tailored "lest the important functions of labor

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in light of constitutional concerns to establish this distinction between chargeable and non-chargeable expenditures; the Court in *Abood* established the same distinction for constitutional purposes.

organizations . . . be unduly impaired," *Allen, supra*, 373 U.S. at 120. In particular, the Court has held that:

> no decree would be proper which *appeared likely to infringe* the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' . . . exactions in support of political activities.

*Id.* at 122 (emphasis added).[4]

Nor was the Court unmindful in *Street* and *Allen* of the interests of objecting feepayers; it recognized that resort to lengthy factfinding proceedings under judicial supervision also would disserve the interests of these individuals, who seek an expeditious resolution of their claims.

Expressing the hope that "prolonged and expensive litigation might . . . be averted," *id.* at 123, the Court has encouraged the adoption of "a simple procedure for allowing dissenters to be excused" from the compelled support of unrelated political activities. Specifically, the Court has suggested that "it would be highly desirable for unions to adopt 'a voluntary plan by which dissenters would be afforded an internal union remedy.'" *Abood, supra*, 431 U.S. at 240, *quoting Allen, supra*, 373 U.S. at 122.

Notwithstanding the Court's evident desire to avoid burdensome litigation and oppressive remedies, precisely the opposite has occurred in practice. The case at bar is illustrative. Following nearly five years of discovery, a federal district court conducted eight days of hearings to determine which expenditures of the exclusive representative were properly chargeable to the plaintiffs. (J.A. 4). The court heard the testimony of 16 witnesses from

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[4] In this regard the Court has rejected as improper any attempt to enjoin the application of a union security clause to non-objectors; even objecting employees' claim to relief is limited to that portion of their fee which is used for unrelated political activities. *See Street, supra*, 367 U.S. at 771-774; *Allen, supra*, 373 U.S. at 119-120.

both sides, and over 1,400 documents were introduced into evidence. The exclusive representative was ordered to pay to the 196 plaintiffs sums ranking from $47 to $352 (JA 370-395); the total amount of the judgment is dwarfed by the cost of this litigation to the exclusive representative and its members, the plaintiffs and the judicial system.

The instant case is not unique. In *Beck v. Communications Workers of America*, No. M-76-839 (D. Md., filed June 4, 1976), an action brought by 20 objecting fee-payers, a Special Master appointed by the district court found—after hearing 27 days of testimony and receiving more than 2,000 exhibits—that under its accounting system the exclusive representative had proved that only 19% of its expenditures were related to collective bargaining; objectors were thus held entitled to a rebate of 81% of their dues and prospectively are required to pay to the exclusive representative a fee equal to only 19% of dues.[8] In an effort to establish a higher proportion of related expenditures in the future, the exclusive representative has implemented a complex cost-accounting system under which officers and staff maintain detailed hourly time sheets keyed to 29 different categories of activity, overhead costs are individually pro-rated as chargeable or non-chargeable, and all time sheets as well as thousands of individual expense vouchers are analyzed by outside accountants and statisticians; this system serves no purpose other than to identify with precision the expenditures to which the 20 plaintiffs and other objectors may be required to contribute.

Nor has this happened only in the private sector; it likewise has been the experience in public sector labor relations. Thus, in *Knight v. Minnesota Community College Faculty Association*, Civ. No. 4-74-659 (D. Minn., Dec. 19, 1974), *aff'd*, 51 U.S.L.W. 3700 (March 29,

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[8] Report of Special Master, filed August 18, 1980, pp. 5, 40.

1983), 20 objecting feepayers brought suit seeking, *inter alia*, to prevent the exclusive representative from expending their fees impermissibly under the Minnesota agency shop statute. In the course of a discovery process which lasted for nearly three years, plaintiffs consumed 46 days in deposing 29 staff members of the defendant unions, and the unions were required to make available some 75,000 pages of documents.[6]

Finally, in *Antonacci v. New Jersey*, No. 82-1119 (D.N.J., April 13, 1982), appeal filed Nos. 82-5698 and 83-5533 (3rd Cir.), a suit brought by 10 objecting public school teachers, the district court has expressed its inclination to accord individual objectors the same status as consumers at a public utility ratemaking proceeding; *i.e.*, before collecting any fee from objecting employees, the exclusive representative would have to prove its chargeable expenditures before a state agency, and would have to pay "rate counsel" to represent "consumers" who wish to challenge its calculations.[7]

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[6] *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery, January 30, 1979, pp. 4-12. The percentage of non-chargeable expenditures was never adjudicated; plaintiffs withdrew their claims on this count before trial, and it was dismissed by the court. *See* Plaintiffs' Memorandum in Support of Motion for Leave to File Second Amended Complaint, February 1, 1980, p. 16 n.41; Stipulation Dismissing the Second Claim from Plaintiffs' Amended Complaint, May 30, 1980.

[7] Transcript of Hearing, October 18, 1982, p. 7; Transcript of Hearing, May 3, 1983, pp. 31-32, 54-56. Although discovery in *Antonacci* has not even started, there already are approximately 200 entries in the *Antonacci* docket, and considerable court time has been consumed by hearings and memoranda submitted on legal motions in this case. See, *e.g.*, Hearing on Plaintiffs' Motion for Preliminary Injunction (June 10, 1982); Hearing on Plaintiffs' Motion for Class Certification (Nov. 19, 1982); Hearing on Cross-Motions for Partial Summary Judgment (May 3, 1983); Hearing on Defendants' Motion to Stay Court's Second Preliminary Injunction (July 15, 1983). The district court to date has issued two opinions totaling 100 pages, each of which granted injunctive relief and has given rise to a separate appeal.

The costs to exclusive representatives simply in defending litigation of this magnitude (let alone in implementing the type of accounting system required by *Beck*, or in paying "rate counsel" for objectors as contemplated in *Antonacci*) have been enormous, and have interfered with the majority's constitutional interests as recognized in *Street*. And all this has resulted from an attempt to protect the interests of a relative handful of objecting employees—employees whose own interests are disserved by such massive litigation.[8]

Manifestly, the foregoing is not what this Court intended. What has happened, quite simply, is that the lower courts have lost sight of the precisely delimited constitutional right of objectors that underlies the Court's decisions in *Street*, *Allen* and *Abood*. As we show, the constitutional interests at stake require only that political or ideological activities unrelated to the union's role as exclusive representative must be separately accounted for and objecting employees may not be required to contribute to the costs of those activities. No more record-keeping than this is warranted nor is massive litigation necessary to identify these expendiutres. *See* pp. 10-13, *infra*. Furthermore, the constitutional interests of ob-

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[8] For example, plaintiffs in *Antonacci* work in bargaining units represented by the New Jersey Education Association, whose local affiliates in 1981-82 represented over 80,000 members and 1,700 feepayers; the total number of objecting feepayers was 51, including the 10 plaintiffs in *Antonacci*. Similarly, in *Knight*, the Minnesota Education Association, a co-defendant along with its affiliate, the Minnesota Community College Faculty Association, represented 38,336 members and 2,618 feepayers during the 1981-82 school year; apart from the 20 plaintiffs in *Knight*, there were 43 other objectors in the state. *See also School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982) (Massachusetts Teachers Association represented 60,000 members and 700 feepayers in 1981-82; the total number of objectors was 200, including the two plaintiffs in the *Greenfield* case). In all of these cases, the amount of fees paid by each objecting employee was approximately $150-200 per year, a fraction of which may have been expended on "unrelated" political activities.

jecting employees can be fully protected by a relatively simple, union-administered procedure which escrows an appropriate portion of their agency shop fees. *See* pp. 22-30, *infra*.

## II. THE OBLIGATION OF OBJECTING EMPLOYEES TO CONTRIBUTE TO THE COST OF ACTIVITIES OTHER THAN COLLECTIVE BARGAINING AND ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS

A. As previously noted, the Court's decisions at least make clear that all employees may be compelled to contribute to activities that are "related to" collective bargaining (p. 4, *supra*). The related to collective bargaining standard is, like any standard, a short-hand summary of a more complex analysis—an analysis that gives meaning to the words used. The Court first ventured into this area in the seminal case of *Railway Employees Dept. v. Hanson*, *supra*, in which it concluded "that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments." 351 U.S. at 238. More recently, in *Abood v. Detroit Board of Education*, *supra*, the Court elaborated upon this conclusion as follows:

> A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.
>
> • • • •
>
> To be required to help finance the union as a collective-bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by

> the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. *As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.*" [431 U.S. at 222-223 (emphasis added)].

*Hanson* and *Abood* thus establish that "all who receive the benefits of [an exclusive representative's] work" may be compelled to support that work.[9] Put differently, so long as an exclusive representative is acting to further "the cause which justified bringing the group together" the interest in avoiding "free riders" provides sufficient basis for requiring all employees in the bargaining unit to contribute to the cost of the representative's activities. This is the rationale that underlies the "related to collective bargaining" standard.

Some lower courts have unfortunately viewed this standard as permitting them to second-guess the exclusive representative's decision, made through its democratic processes, to expend funds on a particular activity in order to advance the interests of its constituents. This unduly expansive view of the proper judicial role, which has given rise to the burdensome litigation and oppressive remedies previously described, finds no support in the Court's decisions. The constitutional concern underlying the limitation that the Court has placed on the use of the fees of objecting employees has been precisely defined—that objecting employees not be compelled to contribute

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[9] In explaining the rationale for precluding compelled fees from being used, over objection, for certain activities, *Street* confirms the point. The Court there concluded that Congress had authorized union shops in the belief that "fairness justified the spreading of the costs to all employees who benefited," 367 U.S. at 761; this rationale, in the Court's view, defined the limits of the types of activities for which compelled fees could be expended, over objection, under the RLA.

to the support of activities "for political and ideological purposes unrelated to collective bargaining." *Abood, supra*, 431 U.S. at 232. The Court there explained:

> One of the principles underlying the Court's decision in *Buckley v. Valeo*, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. . . .
>
> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.
>
> • • • •
>
> We do not hold that a union cannot constitutionally spend funds for the *expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.* Rather, the Constitution requires only that *such expenditures* be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. [431 U.S. at 234-36 (emphasis added)]

As the foregoing quotation indicates, the constitutional right of objectors is simply to refrain from contributing to activities "on behalf of political candidates or toward the advancement of other ideological causes not germane to [a union's] duties as collective-bargaining representative." Two things follow from the limited nature of this right.

First, it is neither constitutionally necessary nor appropriate for a court to go beyond that right and attempt to determine for the members of an exclusive representative which of their *other* expenditures are and are not designed to advance their cause. Once it is determined that an expenditure was not for unrelated political or ideological purposes the constitutional inquiry comes to an end. Lower courts, including the district court in the

instant case, have misread the Court's teaching in this regard.

Second, even where the exclusive representative engages in "unrelated" political or ideological activity, the role of the courts is limited. The objector's right is to refrain from contributing to those expenses incurred by an exclusive representative for unrelated political or ideological activity;[10] protecting that right requires no more than that courts identify the discrete expenditures which directly support those activities. Any other rule necessarily involves the courts in a burdensome exercise in cost-accounting for hundreds if not thousands of separate items and in allocating as between chargeable and non-chargeable expenditures fixed expenses that would be incurred in all events. Although some lower courts have engaged in this exercise,[11] it is plainly not necessary to protect the objectors' rights, and it necessarily leads to the type of burdensome litigation and oppressive remedies that interfere with the rights of the majority.

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[10] In his concurring opinion in *Street*, Justice Douglas, who authored the Court's decision in *Hanson*, illustrated the type of expenditures to which objectors need not contribute:

> If . . . dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money *causes beyond what gave rise to the need for group action.*
>
> I think the same must be said when union dues or assessments are used to elect a Governor, a Congressman, a Senator, or a President.

*Street, supra*, 367 U.S. at 777 (concurring opinion; emphasis added). *See also Allen, supra*, 373 U.S. at 126, ¶ 3.

[11] *See e.g., Beck v. Communications Workers of America, supra.* Report of Special Master, August 18, 1980, pp. 27-28 (allocating chargeable expenditures for union newspaper based on percentage of column space for eight different categories of news); *id.* at 36 (pro-rating cost of maintenance, repair, and operation of union building).

B. Even assuming, *arguendo*, that the constitutional right is broader, and that it is not improper for a court to determine, *de novo*, the extent to which an exclusive representative's expenditures are related to collective bargaining, at least this much is clear: petitioners are wrong in suggesting that only expenditures for negotiating and administering a collective bargaining agreement can satisfy this standard.[12]

As the Court has made clear, the "cause which justified bringing the group together" is the desire by a majority of the employees in a bargaining unit to improve their working conditions. Although the exclusive representative often secures such improvements through collective bargaining and other direct dealings with the employer, these are not the only means used to promote that "cause." And while certain improvements may be achieved away from the bargaining table, the actions that produced them still are "related to" collective bargaining in the sense intended by this Court, *i.e.*, those ac-

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[12] Petitioners not only fail, as we subsequently demonstrate, to appreciate the type of activities that necessarily must be undertaken by an exclusive representative to adequately represent the interests of bargaining unit employees; petitioners also err in contending that an activity cannot satisfy the "related to" collective bargaining standard unless it is undertaken specifically on behalf of the bargaining unit that includes the objecting employees. As the Ninth Circuit in the instant case recognized, bargaining units represented by local affiliates of a national union are interdependent. Thus, the members of a particular bargaining unit benefit from the overall strength and resources of their national union and its efforts in other bargaining units to improve "industry standards" generally, and not simply from the direct services that the national union provides to the particular affiliate. This point is developed in respondents' brief and need not be expanded upon here. We note only that this interdependence exists equally in private and public sector unionism, and the differences between public and private employment discussed in text, *infra*, have no bearing in this regard.

tions are taken in "furtherance of the common cause . . . which justified bringing the group together." [13]

It is hardly unusual for an exclusive representative to take actions away from the bargaining table in "furtherance of the common cause." The Court has acknowledged that "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978), and employees may "seek to improve working conditions through resort to" other forums, *id.* at 566. This is true for public as well as private sector employees, and several of the categories of union activities at issue in the instant case are illustrative of activities that are undertaken by exclusive representatives in both sectors, away from the bargaining table, in "furtherance of the common cause . . . which justified bringing the group together." [14]

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[13] Nor is it relevant for present purposes that activity taken away from the bargaining table may be "politically" controversial. The Court in *Abood* made clear that:

> Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to [objectors'] beliefs the critical constitutional inquiry.

431 U.S. at 232. Rather, as explained in text, the critical inquiry is whether the activity in question, be it "political" or otherwise, is undertaken by the exclusive representative "to advance the cause which justified bringing the group together." Only if the relationship between that activity and employees' interest in improving their working conditions becomes so remote that it no longer meets this standard is it unconstitutional to impose the costs of the activity upon objecting employees.

[14] Litigation, for example, provides a classic illustration of a method by which an exclusive representative in either the private or public sector may act away from the bargaining table to improve the working conditions of those it represents.

Other categories of activities at issue here are related to collective bargaining because those activities are part and parcel of the process of creating, maintaining, and governing a cohesive union —a process in which private and public sector exclusive repre-

There are, however, certain basic political and economic differences between private and public employment that make it particularly important for public sector exclusive representatives to take particular types of action "on fronts other than collective bargaining and grievance settlement within the immediate employment context." [15] We discuss three of these differences below.

1. *The Prohibition Against Public Employee Strikes.* There can be no doubt that in the private sector, "economic force [is] 'a prime motive power for agreements in free collective bargaining.' " *Labor Board v. Insurance Agents*, 361 U.S. 477, 489 (1960) (footnote omitted). Labor's "traditional" and "normal" economic weapon in the private sector is, of course, the strike. *Id.*, 361 U.S. at 495. The Ninth Circuit recognized this in the instant case when it observed that "a strike is one of the central methods employed in collective bargaining for improving wages and working conditions." [16] This is not so in the public sector: except in a few states, strikes by public employees are illegal, either by constitutional prohibition, statutory provision or common law.[17]

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sentatives must engage as a foundation for effective collective bargaining. As respondents demonstrate, this is true of conventions, publications, social activities, organizing and death benefits.

[15] Although the case before the Court arises in the private sector, reference to the experience of public sector unions in relevant for two reasons. First, it illustrates graphically the general point that activities by an exclusive representative that take place away from the bargaining table are often "related to" collective bargaining. Second, to the extent the Court enunciates constitutional principles in this case, they will apply in both sectors, and the Court should be fully aware of the realities of public sector collective bargaining when giving content to the "related to" standard.

[16] The Ninth Circuit affirmed the district court's finding in this regard and held that expenditures for strike activities are chargeable to objecting employees (685 F.2d 1065, 1071); petitioners do not here challenge that determination.

[17] The vast majority of states that authorize public sector collective bargaining prohibit strikes by public employees. M. Lieberman, *Public Sector Bargaining*, 26 (1980). *See, e.g.*, Florida Constitution,

Lacking the right to strike, exclusive representatives in the public sector often find it necessary to utilize other means in an effort to generate pressure on the employer to move toward agreement. Inasmuch as "the employer is the public—in ultimate political terms, the voters to whom the public officials are responsible," Summers, *Public Employee Bargaining-A Political Perspective*, 83 Yale L.J. 1156, 1159 (1974), the exclusive representative frequently is forced to "go public," *i.e.*, attempt to develop community support that will, in turn, generate constituent pressure on the employer. A public employer may modify intransigent positions at the bargaining table if the "costs of disagreement" in terms of voter opposition becomes too high. *See* J. Dunlop and N. Chamberlain, *Frontiers of Collective Bargaining*, pp. 150-152 (1967).

In attempting to persuade the community as to the reasonableness of the employees' bargaining-table positions, the exclusive representative utilizes all of the established techniques for taking its case to the public, including radio and television "spots," newspaper advertisements, person-to-person contacts, etc. Because these activities are undertaken in an effort to persuade a public employer to alter its opposition to the exclusive representative's demands, they are the functional equivalent of the strike in the private sector. As such, they are, to paraphrase the Ninth Circuit, "one of the central methods employed in [public sector] collective bargaining for improving wages and working conditions." [18]

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Art. I, § 6; Mich. S.A. § 17.455(2); Mass. Stat. c. 150E, § 9A. Even those few states that have authorized strikes in the public sector have done so only for certain employees in limited circumstances. *See, e.g.*, 43 Pa. S.C.A. §§ 1101.1001-.1002 (prohibiting strikes by employees of state courts and guards at prisons or mental hospitals; strikes by other public employees prohibited during pendency of collective bargaining procedures). *General Drivers Local 120 v. City of St. Paul*, 270 N.W.2d 877, 880-881 (Minn. S. Ct. 1978) (public employee strikes authorized under Minnesota law only if employer thwarts Act's binding arbitration procedure).

[18] Although, for the reasons explained in text, public education campaigns are especially important in the public sector, such cam-

2. *The Fiscal Dependence of Public Employers.*—In private sector collective bargaining, the employer generally has the power to make financial commitments and to carry them out. Many public employers, on the other hand, do not have final authority to determine the size of their budgets. The ability to fulfill bargaining table commitments as to salaries and other economic items often will be contingent, either because the employer "must gain the consent of higher levels of political authority," [19] or because the employer "depends on some other source such as state aid for its revenues." [20] In these circumstances, it is incumbent upon the exclusive representative to engage in various forms of lobbying in order to persuade some other agency to appropriate sufficient funds to implement the terms and conditions that have been bargained. Indeed, the Court in *Abood* acknowledged this when it noted the importance to the public sector bargaining process of "related budgetary and appropriation decisions." 431 U.S. at 236.

3. *The Statutory Regulation of Working Conditions of Public Employees.*—As the Court has recognized, employees may "seek to improve working conditions through resort to" other forums, including specifically "appeals to legislators to protect their interests as employees. . . ." *Eastex, supra,* 437 U.S. at 566. Unions in both the public and private sectors have engaged in extensive lobbying in support of, *e.g.*, the Fair Labor Standards Act,[21] the

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paigns also may be a useful tactic for a private sector exclusive representative. Private sector employers often are dependent upon public "good will," and a recalcitrant employer may become more willing to compromise disputed issues at the bargaining table if the public is persuaded that its positions are unreasonable.

[19] J. Dunlop and N. Chamberlain, *supra* p. 127. *See Labor Relations Commission v. Dracut Board of Selectmen*, 374 Mass. 619, 373 N.E.2d 1165, 1170 (1977).

[20] M. Lieberman, *supra* n.17, p. 71.

[21] 29 U.S.C. §§ 201 *et seq.* (1938).

Occupational Safety and Health Act,[22] the Employee Retirement Income Security Act,[23] and other statutes that guarantee benefits or provide protections to the employees whom they represent. Resort to the legislative forum to further the interests of employees is especially important in the public sector, however, because of the extent to which the conditions of public employment are controlled by statute.

Lobbying by a public sector exclusive representative to improve working conditions occurs in at least two distinct contexts. Initially, the exclusive representative may be forced to appeal to the legislature to establish that a particular subpect is bargainable. Although public employees in many states have a statutory right to engage in collective bargaining concerning terms and conditions of employment, "the scope of negotiations in the public sector is more limited than in the private sector." [24] Certain subjects which are of vital importance to employees, and which regularly are dealt with through collective bargaining in the private sector are non-bargainable in the public sector, because they are either regulated by statute or left to the employer's discretion.[25] For example, in many states the courts have held that an exclusive representative may not bargain contractual provisions affecting the loss of jobs through reduction in force or the

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[22] 29 U.S.C. §§ 651 *et seq.* (1970).

[23] 29 U.S.C. §§ 1001 *et seq.* (1974).

[24] *In re IFPTE Local 195 v. State*, 88 N.J. 393, 401, 443 A.2d 187, 191 (1982). *See, e.g., Vermont State Colleges Faculty Federation, Local 3180 v. Vermont State Colleges*, 134 Vt. 451, 418 A.2d 34, 37 (1980).

[25] As Professor Summers explains, "[i]n legal terms the principal question in the private sector is what the *mandatory* subjects of bargaining are, *i.e.*, what decisions the employer *must* share with his employees. The principal question in the public sector is what the *permissible* subjects of bargaining are, *i.e.*, what decisions *may* be made through the specially structured political process." Summers, *supra*, 83 Yale L.J. at 1194 (emphasis in original).

re-employment rights of bargaining unit employees.[26] If the exclusive representative is to achieve contractual protections in regard to such subjects, it first must obtain through legislation the right to bargain over them.[27]

If statutory authorization to bargain over a particular term or condition of employment is not obtained, the exclusive representative may have to lobby to secure improvements in that term or condition through direct legislative action. Thus, for example, in virtually every state, the existence and amount of pension benefits for public employees are fixed by statute, and collective bargaining is preempted.[28] Such subjects are of direct, palpable concern to public sector employees and, therefore, to their exclusive representatives. Given the political realities, however, collective bargaining may not be an attainable objective and lobbying may be the only means by which these representatives effectively can make heard the voices of the employees whom they represent.[29]

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[26] *See, e.g., Parsons-National Education Association v. Unified School District No. 503*, 225 Kansas 581, 593 P.2d 414, 418-420 (1979); *Minneapolis Assn. of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W.2d 474, 476-477 (Minn. S. Ct. 1981); *Union Co. Bd. of Ed. v. Union Co. Teachers Assn.*, 145 N.J. Super. 435, 368 A.2d 364 (App. Div. 1976).

[27] *See Board of Education v. Associated Teachers*, 30 N.Y.2d 122, 282 N.E.2d 109, 112, 331 N.Y.S.2d 17 (1972) (validity of provision in public sector contract depends upon whether it concerns a proper subject of collective bargaining).

[28] *E.g.*, 71 Pa. S.C.A. § 5955; Iowa C.A. § 20.9. *See generally City of Mason City v. Public Employment Relations Board*, 317 N.W.2d 851, 854-856 (Iowa S. Ct. 1982) (discussing policy reasons for the decision to preempt bargaining). *See also Harper College Faculty Senate v. Board of Trustees*, 51 Ill. App. 3d 443, 366 N.E.2d 999, 1001 (1977) (bargaining on faculty salary levels preempted).

[29] At least one state supreme court has in effect invited public sector unions to resort to lobbying to protect the interests of bargaining unit employees in regard to these preempted subjects:

> If the subject matter is covered by a specific Civil Service regulation and the parties are dissatisfied, their recourse is to seek

In short, the narrow construction that petitioners seek to place on the "related to collective bargaining" standard simply ignores the realities of labor relations. An exclusive representative, in both the private and public sectors, cannot adequately represent the interests of the employees in the bargaining unit solely by what it does at the bargaining table. It must resort to other forums as well; if these latter activities are undertaken "to promote the cause which justified bringing the group together," *Abood*, 431 U.S. at 223, they necessarily are "related to" collective bargaining. To hold otherwise would frustrate the underlying purpose of the agency shop—"to distribute fairly the cost of these activities among those who benefit." *Abood, supra*, 431 U.S. at 222.[30]

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a modification of such regulation through the administrative process. *Indeed, they may even petition the Legislature where a particular term and condition of employment is controlled by a statute with which they disagree.*

*State v. State Supervisory Employees' Assn.*, 78 N.J. 54, 82, 393 A.2d 233, 247 (1978) (emphasis added). *See also Colonial School Board v. Colonial Affiliate NCCEA*, 449 A.2d 243, 248 (Del. Supr. 1982) (restricting subjects of collective bargaining under state statutory scheme; "if this strict construction is deemed incorrect or unjust today, it is a matter for the General Assembly to rectify. . . .").

Lobbying may be necessary not only to secure favorable working conditions, but also to prevent the legislative erosion of previously-bargained protections. In many states, "adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter." *State v. State Supervisory Employees' Assn., supra*, 78 N.J. at 84, 393 A.2d at 248. *See Mutual Aid Assn. v. City of Yonkers*, 60 A.D.2d 856, 401 N.Y.S.2d 98 (1978) (negotiated wage increases nullified by subsequently enacted statute). For this reason, an exclusive representative must guard against the possibility that the legislature will revoke prior commitments made to the employees whom the exclusive representative represents.

[30] As previously noted (pp. 10-11, *supra*), the justification for the agency shop is the governmental interest in promoting labor peace

## III. ACCOMMODATING THE INTERESTS OF THE EXCLUSIVE REPRESENTATIVE (AND MAJORITY EMPLOYEES) AND OBJECTING EMPLOYEES THROUGH A UNION ESCROW PROCEDURE

Whatever the proper line may be between chargeable and nonchargeable expenditures, some procedure is required to assure that the exclusive representative is able to charge objectors for the former but does not charge for the latter. Recognizing the difficulties that could be involved in judicial enforcement of this line (*see* pp. 4-10, *supra*), the Court in *Allen* "encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan" for the "vindication of the rights and accommodation of interests here involved." 373 U.S. at 122, 124. The Court reaffirmed this position in *Abood*, noting that "it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.'" 431 U.S. at 240. Pursuant to this encouragement from the Court, NEA and other unions have adopted such internal procedures.

Petitioners contend that any union procedure is constitutionally inadequate because it necessarily fails to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." Pet. Br. at 31, *quoting*

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by eliminating "free riders." *Abood*, *supra*, 431 U.S. at 224, 229. Cost-sharing is not only equitable but also tends to lessen friction between those employees in the bargaining unit who are union members and those who are not, thereby minimizing one source of potential labor unrest. The fact that a particular benefit is obtained through community action, lobbying, etc., does not mean that only union members may take advantage of this benefit. Nor does it mean that only those members should be called upon to defray the costs of the exclusive representative's efforts. Thus, for instance, a failure by some employees in the bargaining unit to share the cost of lobbying to protect or improve pension benefits is just as inequitable—and just as likely to increase tensions within the bargaining unit—as a failure by those employees to contribute to the cost of negotiating a contractual provision for health insurance.

*Abood*, 431 U.S. at 244 (Stevens, J., concurring). According to petitioners, in order to avoid this risk, the Constitution requires " 'a provision for a hearing before *a state tribunal* on the availability of any representation fee prior to payment of the fee to the union.' " Pet. Br. at 37, *quoting Robinson v. New Jersey*, 113 L.R.R.M. 3272, 3278 (D.N.J. 1983) (emphasis added). Pending such a determination, petitioners state that *all* fees from objecting employees should be placed into an escrow account. Pet. Br. at 36-37. Petitioners recognize that this will deprive the exclusive representative of the use of the portion of the fee to which it legitimately is entitled, but maintain " 'that the statutory right of the [majority] to the permissible amount is outweighted by the potential that the impermissible amount will be used, even temporarily, in violation of the dissenting [employees'] First Amendment rights.' " *Id.* at 37, *quoting School Committee of Greenfield*, *supra*, 431 N.E.2d at 188. As we now demonstrate, petitioners' constitutional analysis is flawed.[31]

Preliminarily, it may be doubted whether petitioners' proposed 100% escrow remedy is even *permissible*, given this Court's holding that an injunction against the collection of any fees from objecting employees is "improper, even though [the injunction] is subject to modification if [the union] come[s] forward and prove[s] the proportion of exacted funds required for purposes related to collective bargaining." *Allen*, *supra*, 373 U.S. at 120. Indeed, part

[31] The particular focus of petitioners' attention is on union procedures pursuant to which the exclusive representative collects the full amount of the agency shop fees, itself makes a determination of the activities "related to" collective bargaining, and on the basis of that determination refunds to objecting employees at the conclusion of the fiscal year what it considers to be the appropriate portion of the fee. It is not at all clear to us that the court below approved this type of procedure, and petitioners' argument is not in any event limited to that particular procedure. For these reasons, we do not discuss here whether such a procedure is constitutionally permissible, but demonstrate only that the type of procedure petitioners champion is *not* constitutionally required.

of the reason that agency shop litigation has been so burdensome, *see* pp. 6-9, *supra*, is because the lower courts have failed to heed the Court's repeated caution against excessive judicial intrusion into "legitimate activities or necessary functions of unions" (p. 5, *supra*). But assuming, *arguendo*, that a requirement for escrowing all dues pending a hearing by a court or state agency is not foreclosed by the Court's prior decisions, there are alternatives that come far closer to satisfying "the objective . . . of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood, supra*, 431 U.S. at 237.

One such alternative is the procedure that has been adopted by NEA, and is utilized by NEA local affiliates that are recognized as the exclusive representatives in several states, including Ohio, Illinois and New Jersey.[32] This procedure operates as follows.

Promptly after the end of each fiscal year, a member of the National Academy of Arbitrators who has experience in public sector labor relations is selected by NEA to serve as the Agency Shop Impartial Umpire. The function of the Umpire is to determine the percentage of NEA's dues income that NEA expended during the just-ended fiscal year for purposes related to collective bargaining.[33] In making this determination, the Umpire is to be guided by the decisions of this Court, as elabo-

[32] The procedure actually is adopted by the local affiliate and used by it to determine the refundable portion of the total agency shop fee paid to it by objecting employees. This fee includes local affiliate payments and also payments to state and national parent organizations. As explained *infra*, the procedure functions in essentially the same fashion at all three levels. For purposes of simplicity in discussion, we refer in text to the "NEA procedure," and focus on its operation at the NEA level.

[33] A similar procedure is followed by the NEA state affiliate to determine the chargeable portion of its expenditures from its dues income for the fiscal year in question. Because analysis by an impartial third party of the actual expenditures of each of the thousands

rated upon by the the lower courts. And, of course, the Umpire has access to all of the financial records of NEA.[34]

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of local affiliates that have bargained agency shop provisions would entail excessive delay, expense and burden, these affiliates are presumed to have expended the same proportion of their dues income on "related" activities as was determined for the state affiliate. Objecting employees are adequately protected by this presumption since local affiliates—with only local responsibilities—invariably spend at least as much, and probably more, of their dues income for activities "related to" collective bargaining than do state affiliates.

[34] The person who has been selected to serve as the NEA Umpire is Arvid Anderson. Mr. Anderson is a nationally recognized labor-management arbitrator who, since 1967, has been Chairman of the New York City Office of Collective Bargaining. Prior to assuming that position, he was a Commissioner and Executive Secretary of the Wisconsin Employment Relations Commission. Mr. Anderson is both an attorney and an economist. NEA's state affiliates have selected individuals of comparable stature to serve as their umpires. For example, the Umpire for the New Jersey Education Association, which is the NEA affiliate in that state, is Eric Schmertz. Mr. Schmertz, who has been a labor-management arbitrator for more than 25 years, is Dean of the Hofstra University School of Law. He has served as a member of both the New York City Office of Collective Bargaining and the New York State Board of Mediation.

Because neutral arbitrators—and especially individuals of such stature—presumptively can be expected to render impartial decisions, *see Schweiker v. McClure*, 456 U.S. 188, 195 (1982), the NEA procedure responds to petitioners' contention that any procedure that allows a union, in the first instance, to determine itself what percentage of its expenditures are for activities related to collective bargaining (and thus to determine what percentage of the objectors' fees may be expended) is constitutionally flawed because the union will be biased in making its decision. *See* Pet. Br. at 34 n.23. To be sure, under the NEA procedure, the union—out of necessity—selects and compensates the arbitrator, but the Court has never suggested that a decisionmaker may be disqualified as impermissibly biased because of the possibility that he might seek to curry favor with one side or the other through his decision; indeed, were this sufficient to establish unconstitutional bias, all adjudicators would have to be granted life tenure. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928); *Hortonville School District v. Hortonville Education Association*, 426 U.S. 482 (1976).

If an employee who is required to pay an agency shop fee for a particular fiscal year files a written notice with the exclusive representative objecting to the use of his or her fee for activities unrelated to collective bargaining, NEA promptly establishes an interest-bearing escrow account in his or her name.[35] The amount escrowed from each fee payment[36] is equal to the percentage that the Umpire determined to have been expended for "unrelated" activities during the preceding fiscal year, plus a 5% "cushion."[37]

When the fiscal year ends, the impartial review procedure described previously is again followed in order to determine the percentage of NEA's dues income that was expended during the year for purposes related to collective bargaining.[38] The objecting employee then receives a copy of the Umpire's report (explaining how the determination was made) and a check from his or her escrow account in an amount that is equal to the "refundable" portion of the fee paid during the prior fiscal year, plus accrued interest.[39] Any money remaining in the

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[35] The objection notice may be phrased in general terms (*i.e.*, an objection to the expenditure of the fee for impermissible purposes) and need not identify specific expenditures.

[36] The vast bulk of NEA's membership dues and agency shop fees is paid in periodic (*e.g.*, bi-weekly) installments through payroll deduction systems.

[37] Thus, for instance, if the Umpire determined that 11% of NEA's dues income was expended for "unrelated" activities during the 1982-83 fiscal year, 16% of the 1983-84 fee would be escrowed for each objecting employee and only 84% of the fee would be available for use by NEA.

[38] Objecting employees, who previously have been sent an explanation of the procedure, related explanatory materials and copies of the relevant budgets, are free to make written submissions directly to the Umpire.

[39] This check is to be mailed not later than three months after the end of the NEA fiscal year. This modest delay is necessary to enable NEA's independent auditors to complete their analysis and submit an audit to the Umpire. All fees for the next fiscal year

escrow account—which would be attributable to chargeable expenditures—is paid to NEA.[40] If a feepayer wishes to challenge the amount of a refund as inadequate through an available administrative or judicial proceeding, the unrefunded portion of the fee is retained in his or her escrow account (rather than being paid to NEA) until all appeals have been completed.

The practical advantages of the NEA procedure are apparent.[41] By assigning to an experienced arbitrator the task of identifying in the first instance those activities of

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which are collected from an objector before the Umpire's report has issued are placed in escrow pending completion of the report.

[40] If the "refundable" portion for a given fiscal year exceeds the amount in an objecting employee's escrow account, he or she is paid the excess amount, plus accrued interest, from NEA's treasury funds.

[41] By contrast, petitioners' proposal for a "hearing before a state tribunal" would present immense practical problems. Petitioners may be suggesting that each year for each bargaining unit a determination must be made as to the proportion of the exclusive representative's expenditures that will be spent for "unrelated" activities before the representative may use any fees from objecting employees. If this is petitioners' position, the impracticality of the procedure is self-evident. Its implementation will require each state to create a massive bureaucracy and invest substantial resources to hear cases, make the necessary determinations and process appeals from such determinations. It scarcely warrants extended discussion to demonstrate that it would be virtually impossible to do this each year for each of the many bargaining units in the state, and that in practice an adjudication rarely would become final during the fiscal year to which it applied.

Alternatively, petitioners may be suggesting that a determination as to the proportion of the exclusive representative's expenditures that are spent for "unrelated" activities be made "once and for all" for each bargaining unit. Even this task would be a formidable one. Moreover, with the passage of time the relevant proportion may change, and the initial determination necessarily would have to be open to reconsideration at the request of either the objecting employees or the exclusive representative. And once a right to request reconsideration is included in the process, all of the practical problems involved in attempting to make annual determinations would arise.

the exclusive representative that are related to collective bargaining, the procedure provides for an expedited, inexpensive and impartial determination without burdening the courts. If an objecting employee decides to appeal from the Umpire's determination, the reviewing court or agency will have before it a reasoned judgment based on the record of actual expenditures, which at least may be accorded "great weight," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60, n.21 (1974), *quoted in Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 743-44 n.22 (1981).[42] During the fiscal year (when the precise amount of chargeable and non-chargeable expenditures still is somewhat speculative), NEA is not denied the use of all income from objecting employees. And if the proportion of dues income actually expended on activities related to collective bargaining were to exceed the projected proportion (*i.e.*, the proportion expended during the prior fiscal year), the escrow arrangement would make it unnecessary for NEA to engage in a costly and time-consuming effort to recoup from recalcitrant or hostile feepayers the additional amount to which it would be entitled.[43]

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[42] *Cf. United States v. Utah Construction Co.*, 384 U.S. 394, 421-22 (1966) (collateral estoppel applies to factual adjudications made in administrative proceedings). Although the NEA procedure provides that an objecting employee may at any time pursue any available administrative or judicial remedy, a court might elect to refrain from adjudicating a challenge to the portion of the fee being escrowed until after the employee had exhausted his or her remedies under the NEA procedure. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981).

[43] The Court in *Allen*, while suggesting that "a practical decree" might well include a reduction of future exactions by the proportion on non-chargeable to total exclusive representative expenditures for any objecting employee who "prov[es] his right to relief," also "recognize[d] that practical difficulties may attend to a decree reducing an employee's obligations under the union shop agreement by a fixed proportion, since the proportion of the union budget devoted to political activities may not be constant." 373 U.S. at 122.

At the same time, the NEA procedure fully protects the rights of objecting employees. Because the filing of an objection triggers the prompt escrowing of 5% more than the portion of the objector's fee that presumptively would be expended during that fiscal year for "unrelated" activities (*i.e.*, the portion that *was* so spent during the prior fiscal year), it is highly improbable that any of the objector's monies will be spent for such activities. Thus, the concerns of the First Amendment are fully vindicated.[44]

Admittedly, the escrowing of fees deprives objecting employees of the use of a small amount of money for their own purposes for a limited period of time (although even as to this amount, the objectors receive interest to compensate them for the loss). But petitioners' attempt to transform this into a First Amendment injury by characterizing it as a "deplet[ion of] their own funds and resources [which] render[s] them unable to express their own ideas and support their own causes" (Pet. Br. at 35), should be summarily rejected. On this reasoning, any temporary deprivation of money would raise First Amendment concerns because in every case the money might otherwise be spent for protected First Amendment activities. No decision of the Court provides even the remotest support for such a far-reaching theory.[45]

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[44] If the final refund exceeds the amount escrowed, *see* n.40, *supra*, NEA will to the extent of the difference be subject to the concern expressed by Justice Stevens in *Abood* (p. 22 *supra*). But as the Court noted with regard to a slightly different point in *Allen*, "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required." 373 U.S. at 122.

[45] In *Abood*, the Court implicitly reached the opposite conclusion, when it noted that a feepayer who objects to the exclusive representative's permissible use of his or her money to finance activities related to collective bargaining retains the freedom—presumably using other resources—both to criticize and disavow the representative's position and to express his or her own. 431 U.S. at 230.

Moreover, the Court's decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 51 U.S.L.W. 3251 (1982), *dismissing appeal from* 316 N.W.2d 551 (Minn.), establishes that considerations of

In sum, the Constittuion does not require—and the Court's decisions do not suggest—that an exclusive representative should be denied the use of all fees from objecting employees pending a judicial or state agency determination of the amount to which it is entitled. A procedure such as that adopted by NEA, which "avoid[s] the risk that [dissenting employees'] funds be used, even temporarily, to finance' activities unrelated to collective bargaining," (p. 22 *supra*), provides a far more appropriate reconciliation of the interests of the majority and dissenting members of the bargaining unit.

## CONCLUSION

For the above-stated reasons, petitioners' principal arguments are without merit, and the judgment below should be affirmed.

Respectfully submitted,

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due process—including, *inter alia*, the First Amendment interests of objecting employees—do not preclude the escrowing of a small amount of an objecting employee's money for a limited period of time pending a determination of the amount to be refunded.

Finally, it is appropriate to point out that the procedure advocated by petitioners, pursuant to which 100% of objectors' fees are placed in escrow, also would have the effect of depriving objectors temporarily of the use of their money.